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In The
Supreme Court of the United States
October Term, 1992

CHINA EVER BRIGHT TRADING COMPANY,
Petitioner,

vs.

TIMBER FALLING CONSULTANTS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES i
INTRODUCTION 1
CONCLUSION 10

TABLE OF AUTHORITIES

CASES:

Asahi Metal Industry v. Superior Court,
480 U.S. 102 (1987) 3, 8

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 7, 9-10

International Shoe v. Washington,
326 U.S. 310 (1945) 7, 10

Miller & Co. v. China Nat'l Minerals Imp. & Export,
1991 U.S.Dist. Lexis 11973, Case No. 91-c-2460,
(N.D. Ill., Aug. 27, 1991) 7-8

Omni Capital Int'l v. Rudolph Wolff & Co., Ltd.,
484 U.S. 97 (1987) 3

Perkins v. Benguet Consolidated Mining Co.,
341 U.S. 347 (1952) 9

Piper Aircraft Corporation v. Reyno,
454 U.S. 235 (1981), reh. denied
455 U.S. 928 (1982) 8

Texas Trading & Milling Corp. v.
Federal Republic of Nigeria,
647 F.2d 300 (2d Cir. 1981), cert. denied
454 U.S. 1148 (1982) 3-5

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, Amendment V 2-6, 9

Foreign Sovereign Immunities Act,
28 U.S.C. §§ 1330, 1602-11 2-9

Supreme Court Rule 15.7 1

OTHER SOURCES:

House Judiciary Committee, Jurisdiction of United States Courts in Suits Against Foreign States,
H.R. Rep. No. 1487, 94th Cong., 2d Sess.
reprinted in [1976] U.S. Code Cong. &
Admin. News 6606 ..... 3, 6, 9

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INTRODUCTION

Pursuant to Rule 15.7 of this Court, Petitioner China Everbright Trading Company ("Everbright") submits this Supplemental Brief to respond to certain of the views expressed in the Brief for the United States as Amicus Curiae recently filed in this matter. Mindful of the admonition of the Rule that a brief such as this is to be "restricted to new matter," Everbright respectfully notes its disagreement with many of the characterizations and conclusions of the United States' Brief, and urges this Court to review Everbright's petition and reply brief, wherein Everbright's position is set forth as to the current

importance of the questions presented and the reasons that review should be granted.[1]

Certain features of the Solicitor General's discussion of the FSIA, however, deserve additional comment. In a sense, the brief of the United States is remarkable more for its omissions than for its affirmative content. Nowhere does the Solicitor General state the view that application of the national contacts test to a foreign state-owned trading entity under the circumstances of this case is constitutional under the Due Process Clause, nor does he appear to recognize that lower courts have seen the need to construe the jurisdictional provisions of the FSIA liberally, in light of the legislative intent, to avoid constitutional infirmity. Rather, he confines himself to the observation that there is as yet no "square" conflict among courts of appeals' decisions applying the pertinent provisions of the FSIA. And, although the point was directly raised in the petition and thus presumably was among the matters as to which this Court sought the views of the United States, there is no mention in the Solicitor General's brief of the effects on the foreign relations of the United States that must inevitably result from the discrimination inherent in applying a national contacts test to foreign state-owned trading companies while at the same time applying a state contacts test to legally identical claims against domestic corporations or even privately-owned foreign corporations. (See Pet. at 19-21 and 22-23).

By implication, the United States has taken the position that the importance of these questions, some of

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[1] The Court is also respectfully reminded of the pending Motion for Consideration in Tandem, wherein Everbright requests the Court to consider this petition along with its separate petition in No. 92-31 and the sensitive questions concerning the conflict between laws of the United States and the People's Republic of China raised therein.

which this Court has previously noted,[2] turns solely on whether there is a direct conflict among appellate court opinions and not on the nature of the questions themselves or on their impact on foreign sovereigns and their trading entities. Indeed, this surprisingly insular attitude is reflected in the United States' notation of what it calls the "substantial antecedent question" of "whether a foreign state is even entitled to protection under the Due Process Clause." (*See* Br. of U.S. at 12).

If the Executive Branch seriously entertains any doubt as to whether foreign sovereigns, their agencies and instrumentalities involved in proceedings before courts of the United States are entitled to the protections of the Due Process Clause, then surely that is an issue that should be resolved, not allowed to linger. Neither the Congress nor those federal courts that have addressed the issue appear to have shared any such doubt. The United States itself concedes in its brief that Congress took the Due Process Clause into account in formulating the FSIA's jurisdictional provisions (*See* Br. of U.S. at 12 n. 7; see also Pet. at 16 n. 18 and H.R. Rep. No. 1487, 94th Cong., 2d Sess. quoted therein). And the Court of Appeals for the Second Circuit made its own view clear in stating that, when the drafters of the FSIA explained that the "minimum contacts" requirement was "embedded" in 28 U.S.C. § 1330(b), they were merely "confirming what they had no power to deny." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 n. 36 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

The Solicitor General concludes that "[t]here is no current need for this Court to examine the constitutionality of the FSIA" on the grounds that "we know of no

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[2] *See Asahi Metal Industry v. Superior Court*, 480 U.S. 102, 113 n. * (1987), and *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 102 n. 5 (1987) (noting, but not deciding, questions concerning national contacts test and due process); *see also* Petition at 14-15.

court decision holding that the FSIA is unconstitutional" (Br. of U.S. at 12). With the greatest respect, apart from the fact that this statement is something of a *non sequitur* in itself, it ignores the point that a number of courts have found it necessary to engraft due process requirements onto the jurisdictional provisions of the FSIA in a manner which has obviated the need for constitutional challenge to the FSIA itself.

The Solicitor General's assertion that "Petitioner's due process challenge ... is ineluctably a challenge to the FSIA's personal jurisdiction provisions" (Br. of U.S. at 11) is not entirely accurate, as it assumes that the pertinent provisions of the FSIA are cast in terms so clear as not to be susceptible of construction in accordance with the requirements of due process. Petitioner's challenge is to the constitutionality of those provisions *as construed and applied in this case*. This Court need not share the view of the Second Circuit in *Texas Trading* to conclude that Congress intended to conform the jurisdictional provisions of the FSIA to the contours of the Due Process Clause. It need not necessarily reach the question whether Congress was constitutionally compelled to do so, though it may find unavoidable the question whether the discrimination inherent in the assertion of jurisdiction under the circumstances of this case violates the fundamental precepts of the Due Process Clause as incorporated in the FSIA.

Such an approach would concededly require the Court to go beyond the bare textual analysis of the FSIA's jurisdictional provisions proferred by the United States and look to the underlying intent of Congress, as well as to the limitations flowing from its intentional adherence

to due process standards.[3] In fact, there is nothing in the legislative history of the FSIA that would support the proposition that Congress either knowingly or intentionally extended the jurisdiction of United States courts over FSIA defendants beyond the limits that would apply in respect of any other defendant in the same

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[3] The Solicitor General arrives at his conclusion that Petitioner has mounted a frontal assault on the constitutionality of the FSIA itself through a textual analysis that attributes to the statutory language a transparency and simplicity of application that the lower courts have found wanting. *See* Br. of U.S. at 3. While there is nothing inaccurate about the Solicitor General's description of the statutory text, it ignores the complexities the courts have identified:

> The [FSIA] is complex and largely unconstrued ... . In structure, the FSIA is a marvel of compression. Within the bounds of a few tersely-worded sections, it purports to provide answers to three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant. ... Through a series of intricately coordinated provisions, the FSIA seems *at first glance* to make the answer to one of the questions, subject matter jurisdiction, dispositive of all three. ... This economy of decision has come, however, at the price of considerable confusion in the district courts. In fact, Congress intended the sovereign immunity and subject matter jurisdiction decisions to remain slightly distinct, and it drafted the Act accordingly. Moreover, Congress had only an incomplete power to tie personal jurisdiction to subject matter jurisdiction; its prerogatives are constrained by the due process clause. These cases present an opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act.

Texas Trading, supra, 647 F.2d at 306-07 (emphasis supplied). The retreat of the Executive Branch behind what can only be described as an oversimplification of the statutory structure as a predicate for its conclusion that petitioner's argument is a "challenge to the Act itself" (Br. of U.S. at 11n.6) should not be allowed to obscure the point that petitioner's due process argument is necessarily directed, in the first instance, to the question whether the jurisdictional provisions of the FSIA can be construed in a manner that conforms to the intent of Congress that due process requirements be observed.

circumstances, *i.e.*, the limits imposed by the Due Process Clause.

In enacting the FSIA, Congress sought simply to codify the "restrictive theory" of sovereign immunity, which since 1952 had been applied by the Executive Branch in its determinations as to whether to recognize claims of immunity in particular cases. The purpose of the codification was to remove from the Executive Branch responsibility for determinations as to the legitimacy of claims of sovereign immunity and to entrust such determinations instead to the courts, based on objective legal standards. House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News 6607. In carrying out this purpose, Congress intended nothing more nor less than to put state trading entities and other "instrumentalities" engaged in "commercial activities" on the same footing before United States courts as privately-owned entities, whether domestic or foreign. *Id.* at 6607-08. There is no indication in the legislative history that Congress intended to put "agencies and instrumentalities" in a *worse* position than other commercial entities.

The discriminatory effect of the rule applied by the Ninth Circuit in upholding the District Court's assertion of personal jurisdiction over Petitioner is dramatically highlighted by this very case. The District Court's finding of personal jurisdiction over petitioner here was cast in bold relief by its dismissal of substantially identical claims asserted in the same case against a Texas corpora-tion, co-defendant on the third-party counterclaim asser-ted against petitioner, which the District Court found did not have sufficient contacts with the *State of Oregon* to warrant the exercise of jurisdiction under the standards first enunciated by this Court in *International Shoe v. Washington*, 326 U.S. 310 (1945). *See* Petition at 21-22. The same standard would have been applied had the Texas

corporation instead been a privately-owned entity organized under the laws of a third country, as is clear from this Court's decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). In *Helicopteros*, the relevant contacts for purposes of assertion of personal jurisdiction over a Colombian corporation which was *not* an "instrumentality of a foreign state" within the meaning of the FSIA were held to be those of the corporation with the *State of Texas*. Thus, there has been clear discrimination against petitioner here based solely on the fact that it is an "instrumentality of a foreign state" for purposes of the FSIA or, in less technical terms, because it is a state trading entity.

The discrimination in question is not without serious adverse implications for all state trading entities of the People's Republic of China and other countries similarly situated.[4] As this Court has recognized, the courts of the United States are attractive to plaintiffs having claims, real or imagined, against foreign defendants arising out of a broad range of transactions and activities, some of which have only a minimal relationship to the United States. *See Piper Aircraft Corporation v. Reyno*, 454 U.S. 235, 251-

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[4] A decision of the United States District Court for the Northern District of Illinois provides a further example of the discriminatory treatment accorded FSIA entities -- and in that particular case another entity found to be an agency or instrumentality of the People's Republic of China -- in analyzing the constitutional requirements for exercise of personal jurisdiction. *Miller and Company v. China National Minerals Import & Export Corp.*, 1991 U.S. Dist. Lexis 11973, No. 91 c 2460 (N.D.Ill. Aug.27, 1991). After concluding that the defendant in a state law breach of contract matter lacked minimum contacts with the state of Illinois, the district court in *Miller* nevertheless concluded that it could exercise personal jurisdiction based on the defendant's national contacts because the defendant was an agency or instrumentality of the People's Republic of China. 1991 U.S. Dist. Lexis 11973 at *10-*12. (The district court granted China National's motion to dismiss, however, on the alternative ground that the contracts at issue were subject to an arbitration clause. *Id.* at *18-*20).

252 n. 17, (1981), *reh. denied*, 455 U.S. 928 (1982). This Court has also recognized the extraordinary difficulties and hardships confronting a foreign party in dealing with litigation in the United States. *Asahi Metal Industry v. Superior Court*, 480 U.S. 102, 114 (1987) ("the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.") Adherence to a rule under which a state trading entity of the People's Republic of China is more likely to be haled into a United States court than, for example, a privately-owned company organized under the laws of Colombia thus works a real hardship on the former and can only detract from the international reputation for even-handed justice enjoyed by the courts of this country.[5]

Notwithstanding the strong inference from the legislative history that Congress could not have intended the jurisdictional provisions of the FSIA to be applied in a manner which discriminated against state trading entities, the United States in its brief appears to assume that Congress intended that personal jurisdication exist *somewhere* in the United States with respect to *every* suit on claims from which foreign states, their agencies and

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[5] In fact, the hardship in this particular case is unusually severe, in that the national contacts test as applied in this case was used as the basis for the assertion of *general* jurisdiction. Thus, if the decisions below are allowed to stand, petitioner and other state trading entities similarly situated will be subject to the personal jurisdiction of state and federal courts *everywhere* in the United States on *all* claims against them as to which they do not enjoy immunity under the 28 U.S.C. § 1605. In light of the relatively strict criteria established by this Court for the exercise of general jurisdiction, this result is particularly anomalous, and the unfairness inherent in the discrimination resulting from the application of the national contacts test is particularly acute. *Compare Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) *and Perkins v. Benguet Consolidated Mining Co.*, 341 U.S. 347 (1952).

instrumentalities are not immune.[6] Such an assumption, however, would find no support whatever in the legislative history or indeed in the underlying purposes of the FSIA. To the contrary, it is clear that the congressional purpose was limited to the removal of unique obstacles to suits against foreign sovereigns, their agencies, and instrumentalities which were otherwise *already within* the personal and subject matter jurisdiction of United States courts prior to the enactment of the FSIA, and did not include obliteration of otherwise applicable limitations or safeguards concerning the exercise of personal jurisdiction.[7]

Nor would it be unfair to potential plaintiffs to apply the FSIA in accordance with this purpose and with the requirements of due process. The dismissal for lack of jurisdiction in *Helicopteros* was upheld notwithstanding the fact that, from all that appears, there was no assurance that personal jurisdiction could have been obtained over the defendant before any other United States court. There is no automatic right to bring a claim in a United States court against a foreign entity having no domicile in the United States, other than on the basis of the sufficiency of contacts with the forum under the standards ennunicated in *International Shoe* and its progeny.

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[6] This is, in any event, the import of the Solicitor General's reading of the text of the Act; *see* Br. of U.S. at 2-3, 10.

[7] The problem to which the FSIA was addressed was not a lack of *jursidiction* of United States courts over foreign sovereigns or their commercial entities, but rather the lack of an objective legal standard against which the courts, rather than the State Department, could determine the validity of the *defense* of sovereign immunity in particular cases. House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News 6606.

CONCLUSION

The questions presented by this case are important, and should be reviewed by this Court. The petition for a writ of certiorari should be granted.

Dated: September 3, 1992.

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